

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
Velma Korbøl, Commissioner,
Department of Human Rights,
Complainant,

v.

Unbank Company, LLP,
Respondent.

**ORDER COMPELLING
DISCOVERY**

This matter is before Administrative Law Judge Beverly Jones Heydinger to consider the request from the Respondent to compel response to discovery in this proceeding.

Margaret Jacot, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, represents the Department. Andrew D. Parker, Parker Rosen LLC, 300 First Avenue North, Suite 200, Minneapolis, MN 55401, represents Respondent.

The Department has refused to turn over its file to the Respondent because it contends that doing so will disclose the Department's investigative process. It has submitted the file to the Administrative Law Judge for *in camera* review. Minnesota Statutes section 363A.35, subd. 2 classifies human rights investigative files as confidential or protected nonpublic data, which means that they are generally not available even to the subjects of the data.¹ The statute contains several exceptions to these restrictions, including subdivision 2 (c) which permits the Commissioner of Human Rights to "make human rights investigative data contained in an open case file accessible to a person, government agency, or the public if access will aid the investigative and enforcement process" after making a finding of probable cause in a case.

¹ See Minn. Stat. § 13.02, subd. 3. "Confidential data on individuals' means data which is made not public by statute or federal law applicable to the data and is inaccessible to the individual subject of that data." and § 13.02, subd. 13. "Protected nonpublic data' means data not on individuals which is made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data."

Thus, the Department has the discretion to release the investigative file in this matter, but is choosing not to, based on an assertion that the file contains information that reveals internal processes, procedures and decisions of the Department.

Based upon the record in this matter, and for the reasons more fully set forth in the accompanying memorandum the Administrative Law Judge makes the following:

ORDER

1. The Department shall provide its investigative file in this matter within ten working days of receipt of this Order, subject to the following exceptions:

- a. Copies of documents supplied by the Respondent. It is sufficient to provide the Respondent with a list of the documents or otherwise identify them for the Respondent;
- b. Duplicates of other documents in the file.
- c. The name of a third party mentioned in the interview of Tykeisha Crouch in response to Question 19 (marked as MDHR 440) should be redacted before the copy is turned over to the Respondent.

2. At this time, there is no apparent basis to issue a Protective Order.

Dated: February 26, 2008

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

The Department has asserted that release of its file will disclose its internal process and hamper its ability to conduct investigations. However, when proceeding to a contested case, the Department has an affirmative obligation to release certain information. Minnesota Rules pt. 1400.6700, subp. 1, requires that parties disclose to one another "[a]ny relevant written or recorded statements made by the party or by witnesses on behalf of a party. The demanding party shall be permitted to inspect and reproduce any such statements." Thus,

interviews of the charging party and potential witnesses should be disclosed in order to allow the Respondent the opportunity to prepare for hearing.

Subpart 2 of the same rule permits that [a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed.” Rule 26.02 of those rules generally state:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

The general rule is that material assembled pursuant to public requirements, materials gathered in the ordinary course of business, or for other non-litigation purposes are not work product and are discoverable.² In Human Rights cases, the materials are protected until a determination is made that a charge will be filed. That is sufficient protection for the investigative process. The Department has not asserted any privilege recognized by law for withholding information from its file after the charge is filed. None of the documents in the file would appear to be covered by the attorney-client privilege. Moreover, there is no assertion that the documents were prepared for litigation after the charging decision.³ The Department has not provided any basis in statute for its claimed interest in protecting internal deliberative process once the charge has been filed. Moreover, the majority of the information in the file apart from the witness statements was apparently submitted to the Department by the Respondent. There is no basis for failing to disclose the presence of this information.

Thus, with the exceptions set forth in this Order, the Department shall disclose the contents of its file to the Respondent.

B. J. H.

² Herr and Haydock, Minnesota Practice – Rules of Civ. Prac. Ann., ¶ 26.13.

³ See Minn. R. Civ. P. 26.02 (d).